NO. 89-1885

In the Supreme Court of the United States

October Term, 1989

THAIS CARRIERE, INDIVIDUALLY AND ON BEHALF OF RICHARD DARCEY CARRIERE, SAMUEL CARRIERE, V, LEANORA PAIGE CARRIERE TOMENY, THAIS MARIE CARRIERE AND CLAYTON JOSEPH CARRIERE,

Petitioners,

vs.

SEARS, ROEBUCK & COMPANY, SIZELER REALTY COMPANY, SIZELER REAL ESTATE MANAGEMENT COMPANY, INC., CONNECTICUT GENERAL LIFE INSURANCE COMPANY, ON BEHALF OF ITS SEPARATE ACCOUNT R, WILLIAM McINNIS AND ALLSTATE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Do the Federal Rules of Civil Procedure prohibit the contemporaneous hearing of a motion to remand and non-diverse defendants' motions for summary judgment?

II.

Have petitioners presented sufficient grounds for the reversal of the lower courts' interpretation of Louisiana law?

INTERESTED PARTIES

The following list of all parent and nonwholly owned subsidiaries of respondents, Sizler Realty Company, Inc. and Connecticut General Life Insurance Company, on behalf of its Separate Account R, is provided pursuant to Supreme Court Rule 29.1:

Westminster Assets Co., Inc.
Connecticut General Corporation
CIGNA Holdings Inc.
CIGNA Corporation
Greenspoint Marriott Restaurant Corporation
North Coast Investment Corporation
PCGP, Inc.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Sizeler Realty Co., Inc., Sizeler Real Estate Management Co., Inc. and Connecticut General Life Insurance Company, on behalf of its Separate Account R, respectfully pray that the Petition for a Writ of Certiorari

to the United States Court of Appeals for the Fifth Circuit be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 893 F.2d 98 (5th Cir. 1990).

RULES INVOLVED

Fed. R. Civ. Pro. 1 provides:

RULE 1. Scope of Rules

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. *They shall be construed to secure the just, speedy, and inexpensive determination of every action.* (emphasis added).

STATEMENT OF THE CASE

Petitioners filed a meritless lawsuit in a Louisiana state court on January 28, 1988, fraudulently joining two nondiverse defendants. After removal to the United States District Court for the Eastern District of Louisiana, that court correctly applied federal procedural and Louisiana substantive law to retain jurisdiction and dismiss petitioners' ill-founded claims. The Fifth Circuit affirmed and denied petitioners' petition for rehearing. Petitioners' reasons for why this Honorable Court should review the lower courts' judgments are equally meritless. Petitioners' collage of factual misstatements, procedural distortions

and legal rhetoric are inadequate to warrant further review.

Despite a predominantly procedural argument, petitioners inaccurately recite the lawsuit's procedural history. Many procedural distortions arise from petitioners' collective reference to the respondents, Sizeler Real Estate Management Co., Inc.[1] and Sizeler Realty Co., Inc.[2], as "Sizeler Interests." This collective reference masks significant procedural developments. Petitioners did not file "a petition for damages in the state court in New Orleans, Louisiana against Sizeler Interests." (Petition at 3). Petitioners' state court petition only named *Sizeler Realty*, a Louisiana corporation whose contractual relationship with The Plaza in Lake Forest Shopping Center[3] was completely severed over a month before the death which gave rise to this lawsuit, as defendant. *Sizeler Real Estate* was not a party when the action was removed to federal court. Only Sizeler Realty — not both "Sizeler Interests" — was a party to this suit at the time of petitioners' remand motion. Sizeler Real Estate was not a party to the April 12, 1988 opposition memorandum to petitioners' remand motion. Sizeler Real Estate was named defendant *on April 26, 1988* in an attempt to cure petitioners' improper joinder of Sizeler Realty.

Petitioners also misstate the time period between initial raising of the fraudulent joinder issue and the hearing of the remand motion. Petitioners inaccurately state that their motion to remand was heard "approximately six weeks" after fraudulent joinder was first pled. (Petition at

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1. Hereinafter "Sizeler Real Estate."

2. Hereinafter "Sizeler Realty."

3. Hereinafter "the Lake Forest Shopping Center."

4). In fact, over four months passed between these events.[4] The removal petition alleging fraudulent joinder was filed by respondents, Sears, Roebuck and Company[5], Allstate Insurance Company and Sizeler Realty, *on March 7, 1988.* Petitioners' motion to remand was heard *on July 13, 1988.*

Petitioners' omission of all proceedings between April 12, 1988 and May 25, 1988 significantly distorts the proceedings below. During this time frame petitioners moved for continuance of the scheduled hearing of their remand motion on the grounds that respondents' opposition memoranda were *"in the nature of a motion for summary judgment."* (Petitioners' Motion to Continue Hearing on Plaintiffs' Motion to Remand, p. 2; emphasis added). After the hearing was re-set for June 1, 1988, respondents, Sizeler Real Estate, Sizeler Realty and Connecticut General Life Insurance Company, on behalf of its Separate Account R,[6] moved for a second continuance. Respondents' motion advised the court and petitioners that a summary judgment motion was forthcoming and requested contemporaneous hearing of the remand and summary judgment motions. *Petitioners did not oppose this motion.*

Petitioners also misrepresent the proceedings by omitting any reference to the discovery conducted to oppose Connecticut General's motion for summary judgment. In November 1988, petitioners deposed John Hance, one of Carriere's co-workers, and Joel Jacobs, Sizeler Real

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4. Petitioners' computation of the time period "from start to end" of the lawsuit is also wrong. (Petition at 6). Suit was filed on January 28, 1988. The district court entered final judgment on January 11, 1989, not "one hundred sixty-nine days" later. (Petition at 5, 6).

5. Hereinafter "Sears."

6. Hereinafter "Connecticut General."

Estate's Senior Vice-President and Director of Property Management. These depositions confirmed the absence of liability on behalf of Sizeler Realty, Sizeler Real Estate and Connecticut General. Based on the facts disclosed in these depositions, the district court granted summary judgment to Connecticut General, a party whom petitioners alleged was *vicariously* liable for the acts of the previously-dismissed Sizeler Real Estate and Sizeler Realty.

Petitioners also misstate one of the most important substantive facts of the case — the location of the decedent's death. The Lake Forest Shopping Center is comprised of several distinct, separately owned, properties including parcels of real estate owned by respondents, Sears and Connecticut General. *Carriere v. Sears, Roebuck & Company*, 893 F.2d 98, 99 (5th Cir. 1990). Petitioners' decedent, a Sears security guard, was killed on the parcel owned by Sears. Despite the importance of this fact under Louisiana law, petitioners represent that Connecticut General owned "the shopping mall where the Sears store was located." (Petition at 3). This ambiguous sentence misleads an unknowing reader into believing that Connecticut General owned the property where the death occurred. Connecticut General did not own that property. Petitioners' inaccurate and, at best, inartful phrasing of this sentence distorts a critical fact underlying the lower courts' judgments.

SUMMARY OF THE ARGUMENT

Petitioners do not claim that the Fifth Circuit's decision conflicts with any precedent of this Honorable Court or any other federal appellate court, nor do they claim that it violates any constitutional provision or misinterprets any federal statute. Petitioners only claim that the Fifth Circuit departed from its own precedents when construing the Federal Rules of Civil Procedure.

Petitioners' contention that the decisions below misapplied the Federal Rules of Civil Procedure rests on the faulty premise that petitioners could have waived an objection to federal subject matter jurisdiction. All the cases cited by petitioners are distinguishable. None support petitioners' proposition that a jurisdictional objection is waived by conducting discovery. The lower courts correctly construed and applied the Federal Rules of Civil Procedure.

Respondents owed no duty under Louisiana law to protect petitioners' decedent against criminal assaults. The federal courts sitting in Louisiana correctly applied Louisiana law.

Petitioners provide no adequate grounds for further review.

ARGUMENT

I. Petitioners Could Not Waive An Objection To Subject Matter Jurisdiction.

Petitioners attempt to conceal the substantive deficiencies of their claims by conjuring a procedural "dilemma." Petitioners' argument for review rests on the faulty premise that they could somehow have waived an objection to subject matter jurisdiction.[7] Petitioners fear a figment of their own imagination. Whether nondiverse defendants are "fraudulently joined" determines the existence of federal diversity jurisdiction. Litigants may not confer subject matter jurisdiction upon a federal court by failing to object. *Bender v. Williamsport Area School District,*

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7. Notably, petitioners' appellate brief did not argue this issue to the Fifth Circuit.

475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986). Even if the litigants concede jurisdiction, every federal appellate court is obliged to satisfy itself of the existence of federal jurisdiction. 475 U.S. at 541. The federal courts, at all levels, have the power to notice the absence of subject matter jurisdiction *sua sponte*. Rule 15.1 of this Court acknowledges that litigants cannot waive objections to subject matter jurisdiction:

> Any defect of this sort in the proceedings below *that does not go to jurisdiction* may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition. S. Ct. R. 15.1; (emphasis added).

Like Don Quixote jousting with windmills, petitioners perceive a non-existent danger. Petitioners would not have waived their jurisdictional objection by conducting discovery.

Petitioners' citations undermine their own contentions. The rulings in *Harris v. Edward Hyman Co.*, 664 F.2d 943 (5th Cir. 1981); *McKay v. Boyd Construction Co, Inc.*, 769 F.2d 1084 (5th Cir. 1985); *Johnson v. Odeco Oil & Gas Co., Inc.*, 679 F.Supp. 604 (E.D.La. 1987); *Wade v. Fireman's Fund Insurance Company*, 716 F.Supp. 226 (M.D.La. 1989); *Roberts v. Vulcan Material Company*, 558 F.Supp. 108 (M.D.La. 1983); *Fristoe v. Reynolds Metal Co.*, 615 F.2d 1209 (9th Cir. 1980); and, *Commercial Associates v. Tilcon Gammino, Inc.*, 670 F.Supp. 461 (D.R.I. 1987), do not stand for the proposition that petitioners would have waived a jurisdictional objection by conducting discovery. These cases are procedurally distinguishable in two respects: 1) the cases finding "waiver" are limited to *technical defects* in removal, not subject matter jurisdiction; and, 2) none involve plaintiffs who had filed a motion

to remand *before* conducting discovery. These cases only highlight the fallacy of petitioners' argument.

McKay, 769 F.2d at 1084, cited and quoted by petitioners, subverts their own position. (Petition at 12). The issue of federal jurisdiction was first raised *on appeal* in *McKay*. After finding that the Eleventh Amendment barred the plaintiffs' federal claim against the Mississippi State Highway Department, *the Fifth Circuit remanded the entire case to state court. McKay* did not rule that the Mississippi State Highway Department waived its objection to federal jurisdiction. The language cited by petitioners highlights the distinction between objections to jurisdiction and technical defects in removal. The defect that the Fifth Circuit described, in *dicta*, as "waived" was 28 U.S.C. §1441's technical limitation prohibiting the removal of an action in which any defendant is citizen of the forum state. *McKay*, 769 F.2d at 1087. An objection on this grounds does not address itself to subject matter jurisdiction, only to compliance with Section 1441's technical requirements for removal. *McKay* does not support petitioners' fear of "waiver."

Petitioners' remaining cases are similarly distinguishable. *Commercial Associates*, 670 F.Supp. at 463, involved the same technical defect as *McKay*, 769 F.2d at 1084. The *Harris*, 664 F.2d at 943, and *Wade*, 716 F.Supp. at 226, removal petitions were *technically defective* because all defendants did not timely consent to removal. In *Roberts*, 558 F.Supp. at 108, one defendant's citizenship was not alleged in the removal petition and had not joined in the removal. The *Fristoe*, 615 F.2d at 1209, removal was untimely. *Johnson*, 679 F.Supp. at 604, was an improperly removed Jones Act suit. None of petitioners' cases find a waiver of jurisdictional objections. None

suggest that petitioners would have waived an objection to federal jurisdiction by conducting discovery in an effort to oppose respondents' motions for summary judgment.

Petitioners' cases are also distinguishable based on the timing of the remand motions. Petitioners timely objected to removal by filing their motion to remand sixteen days later. None of the petitioners' cases involve a timely objection to removal. In *Wade*, 716 F.Supp. at 227-228, and *Roberts*, 558 F.Supp. at 108, *the courts*, not the plaintiffs, noticed the procedural defects in removal. In *Fristoe*, 615 F.2d at 1212, the plaintiff did not raise a technical defect in removal until the case was on appeal. The *Johnson* plaintiff waited almost a year after removal and participated in discovery before seeking remand. *Johnson*, 679 F.Supp. at 605-606. None of the remaining cases involved a plaintiff who had moved to remand before participating in discovery. Thus, even were it possible for petitioners to waive a jurisdictional objection, the cited cases do not support a finding of waiver under the present circumstances. The foundation for petitioners' perceived "irreconcilable dilemma" does not exist.

II. The District Court's Proceedings Were Perfectly Appropriate.

Petitioners' actions prior to the July 13, 1988 hearing highlight the propriety of the proceedings in the district court. The hearing of petitioners' remand motion was originally set for April 21, 1988. Petitioners moved for a continuance on the grounds that respondents' opposition memoranda "were in the nature of a motion for summary judgment." The district court continued the hearing until June 1, 1988. Since Sizeler Realty and Sizeler Real Estate were nondiverse defendants and a primary issue at the re-

mand hearing would be whether they had been fraudulently joined, these parties moved for a second continuance on May 17, 1988. Respondents' motion recited that they would be filing motions for summary judgment and that judicial economy dictated contemporaneous hearing of the summary judgment and remand motions. *Petitioners did not oppose respondents' continuance motion nor object to respondents' request that the motions be heard contemporaneously.*[8] After the summary judgment motions were filed, Sizeler Realty and Sizeler Real Estate moved for leave that their memorandum supporting the summary judgment motions also be considered a supplemental opposition memorandum to petitioners' remand motion.[9] *Petitioners did not oppose respondents' motion that the memorandum be considered on both motions.* Petitioners' acquiescence in these proceedings arose from their recognition that the district court could properly hear a remand motion and nondiverse defendants' motions for summary judgment contemporaneously.

Petitioners' tardy objection to this procedure is somewhat confusing. *Petitioners concede that the district court properly considered matters outside of the pleadings,* the respondents' affidavits and documentary evidence, when deciding the motion to remand. (Petition at 8). Petitioners do not expressly complain of the standard applied by the district court when deciding the motion to remand. Petitioners only contend that the Fifth Circuit "distorted its own precedent" by permitting the remand and sum-

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8. On July 6, 1988, a week before the hearing, petitioners belatedly argued that the two hearings should be separate in a memorandum supporting a motion to continue the summary judgment hearing.

9. Connecticut General, a diverse defendant only alleged to be *vicariously* liable for the acts of Sizeler Realty and Sizeler Real Estate, did not move for summary judgment at this time because its citizenship was not at issue in the jurisdictional motion.

mary judgment motions to be orally argued at one hearing. (Petition at 6). The gravamen of this contention is that the summary judgment motion somehow improperly influenced the district court's consideration of the remand motion. No federal statute or procedural rule prohibits federal district courts from entertaining both motions at one hearing. No case law so restricts the discretion of the federal judiciary. One must ask: Do petitioners suggest that that a different result should obtain if the remand motion were heard at 9:00 a.m. and the summary judgment motions at 10:00 a.m.?

Petitioners do not claim that the Fifth Circuit's decision conflicts with any precedent of this Honorable Court. Neither do they claim that the Fifth Circuit's opinion conflicts with any decision of another federal appellate court. They do not argue any constitutional violations nor any misinterpretations of federal statutes. Petitioners only complain that the Fifth Circuit misinterpreted its own precedents. The Fifth Circuit opinions in *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981), and *Keating v. Shell Oil Co.*, 610 F.2d 328 (5th Cir. 1980), were extensively briefed and orally argued before the Fifth Circuit. The litigants highlighted the language in those decisions which favored their contentions. The Fifth Circuit considered those contentions and explained its prior precedents. Dissatisfied with the Fifth Circuit's explanation of its previous opinions, petitioners again pick and choose quotations from three Fifth Circuit opinions. Petitioners, not the Fifth Circuit, distort the rulings of that court. Petitioners' distortions do not warrant review by this Court.

III. Louisiana Law Was Correctly Applied.

Petitioners also request this Court to review the lower courts' application of Louisiana law. The United

States District Court for the Eastern District of Louisiana is located at 500 Camp Street, New Orleans, *Louisiana*. The United States Court of Appeals for the Fifth Circuit is located at 600 Camp Street, New Orleans, *Louisiana*. The Louisiana Supreme Court is within walking distance of the two federal courts. The lower courts which decided this case routinely consider questions of Louisiana law.

Petitioners' request is particularly unpersuasive in this case. The Fifth Circuit's decision in *Banks v. Hyatt Corporation*, 722 F.2d 214 (5th Cir. 1984), is an authoritative analysis of the Louisiana legal principles applicable to the present facts. The only Louisiana Supreme Court opinion cited in support of petitioners' argument that Sizeler Real Estate and Sizeler Realty were not fraudulently joined, *Harris v. Pizza Hut, Inc.*, 455 So.2d 1364 (La. 1984), directly relied on the Fifth Circuit's interpretation of Louisiana law in *Banks*. In disputing the Fifth Circuit's resolution of an issue on which the Louisiana Supreme Court has acknowledged its competency, petitioners ignore two critical facts: 1) petitioners' decedent was murdered on property that was not managed by Sizeler Real Estate or Sizeler Realty; and, 2) petitioners' decedent had no relationship to either Sizeler Realty or Sizeler Real Estate. *Carriere was employed as a Sears' security guard protecting Sears' property at the time of the murder.* The flaw in petitioners' case has always been that they have asked the courts to find that Sizeler Realty and Sizeler Real Estate owed a duty to protect an adjacent property owner's security guard. No such duty exists under Louisiana law.

The cases cited by petitioners, *Willie v. American Casualty Co.*, 547 So.2d 1075 (La. App. 1st Cir. 1989), and *Smith v. Walgreens Louisiana Co., Inc.*, 542 So.2d 766 (La. App. 4th Cir. 1989), do not create such a duty. *Willie* and

Smith are factually distinguishable because the plaintiffs were assaulted on the defendants' properties.

Petitioners argue that *Willie*, 547 So.2d at 1075, and *Smith*, 542 So.2d at 766, expand the class of persons to whom commercial establishments owe a duty of protection. This alleged expansion does not encompass the petitioners' decedent. Neither *Smith* nor *Willie* expanded that duty to persons who were not on the defendants' premises. Petitioners' discussion of this issue disputes — for the first time — the relationship between Carriere and respondents. (Petition at 20). The relationship between these parties was never "in dispute" in the lower courts. *Carriere*, 893 F.2d at 101. This issue cannot be disputed because the only relationship which existed was the employer/employee relationship between Carriere *and Sears*. Carriere had no relationship with Sizeler Realty, Sizeler Real Estate or Connecticut General. *Id.* Absent factual support, petitioners suggest that the courts must *presume* a relationship between the parties. Petitioners cite no legal authority for this "presumption." The lower courts' application of Louisiana law provides no basis for review.

IV. Petitioners' Rhetoric Distorts The Applicable Legal Precepts.

Petitioners inaccurately recite the law on several occasions. Petitioners' statements about the role of the federal judiciary and federal summary judgment practice are especially egregious. Petitioners' claim that the "the federal judiciary has no interest in this matter beyond determining the fraudulent joinder question" is absolutely incorrect. (Petition at 15). The federal judiciary has a perfectly legitimate interest in deciding every matter within federal jurisdiction. If nondiverse defendants are improperly joined as they were in this case, the federal

courts may properly decide all remaining issues in the litigation. Petitioners' meritless claims against the diverse defendants were matters of legitimate interest to the federal courts and were properly dismissed.

The petitioners' dissatisfaction with the summary dismissal of their claims arises from an outdated view of federal civil procedure. Petitioners suggest that summary judgment is a disfavored procedural mechanism, describing it as a "drastic device." (Petition at 10). Petitioners' argument ignores this Honorable Court's guidance in *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1966):

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but as *an integral part of the Federal Rules as a whole*, which are designed "to secure the just, speedy and inexpensive determination of every action.". . . *Rule 56 must be construed with due regard* not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also *for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.*

477 U.S. at 327; (emphasis added).

The proper application of Rule 56 required the dismissals of petitioners' claims.

Petitioners also misstate the standard for deciding a motion for summary judgment. Respondents' summary judgment motions did not require petitioners to demonstrate, as they claim, "ultimate success on the

merits." (Petition at 8). A party opposing a motion for summary judgment need only show genuine issues of material fact or that the moving party is not entitled to summary judgment as a matter of law. Fed. R. Civ. Pro. 56(c). Petitioners did not meet this standard.

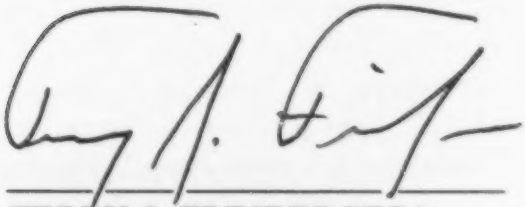
Petitioners claim that plaintiffs "cannot possibly know how to proceed" after the Fifth Circuit's decision. (Petition at 14). The answer is simple: plaintiffs should proceed in the manner required by Fed. R. Civ. Pro. 1 and as reiterated in *Celotex Corporation* — by taking those steps necessary "to secure a just, speedy and inexpensive determination of every action." Under the circumstances of this case, these criteria require a plaintiff to timely file a motion to remand. If faced with a motion for summary judgment, the plaintiff must diligently conduct whatever discovery he deems necessary to oppose that motion. As long as the plaintiff has adequate time to meet that motion, as here, it is of no moment that a federal district court exercises its discretion to hear both motions simultaneously. The United States District Court for the Eastern District of Louisiana followed Rule 1. Petitioners did not.

CONCLUSION

Respondents, Sizeler Realty Company, Inc., Sizeler Real Estate Management Company, Inc. and Connecticut General Life Insurance Company, on behalf of its Separate Account R, respectfully submit that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

MONTGOMERY, BARNETT, BROWN,
READ, HAMMOND & MINTZ

BY: 

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